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Nos. 02-1845 and 03-83

IN THE

Supreme Court of the United States

AETNA HEALTH INC., *Petitioner*,
v.
JUAN DAVILA, *Respondent*.

CIGNA HEALTHCARE OF TEXAS, INC., *Petitioner*
v.
RUBY R. CALAD, ET AL., *Respondents*.

On Writs Of Certiorari to the United States Court of Appeals for the Fifth Circuit

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENTS

DAVID S. CASEY, JR.
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500
President,
The Association of
Trial Lawyers
of America

DANIEL M. SOLOWAY *
901 Scenic Highway
Pensacola, FL 32503
(850) 435-0555
* *Counsel of Record*

Jeffrey Robert White
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500
Attorneys for Amicus Curiae

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENTS

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] respectfully submits this brief as *amicus curiae*. The parties have filed letters of consent to the filing of amicus briefs with this Court.[1]

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[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent individual plaintiffs in civil actions.

Many of those individuals are those who have suffered harm due to substandard medical care. Increasingly, as managed care has come to dominate the health care delivery system, they include those harmed by poor medical decisions, not by their treating physicians, but by plan administrators or others performing utilization review in the managed care setting.

In ATLA's view, the Texas Health Care Liability Act, which holds insurers, HMOs, and managed care entities accountable when they fail to use ordinary care when making medical decisions, provides an incentive to minimize such harm and affords access to a legal remedy for wrongfully injured victims.

SUMMARY OF THE ARGUMENT

1. This case, like every preemption case, is about federalism. Respondents' causes of action arise under the Texas Health Care Liability Act, which requires health insurers, HMOs and managed care entities to use due care when they make health treatment decisions, including determinations of "medical necessity" under an ERISA plan. Petitioners contend that these damage actions are preempted – not under the express preemption provisions Congress included in ERISA, but by operation of implied

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make a monetary contribution to the preparation or submission of this brief.

"complete preemption" of ERISA's civil enforcement provisions.

ATLA urges this Court to define the scope of this implied preemption narrowly. This Court has consistently emphasized that to protect the role of the sovereign states, it will find preemption of state law only where Congress has made clear and manifest its intent to do so, particularly strong where, as here, Congress has acted in an area traditionally regulated by the states. Moreover, the presumption applies not only to the question of whether federal law supersedes state law, but also to the scope of preemption.

By requiring that Congress make its intent clear and manifest, the Court preserves the structural protection of the states through their representation in Congress. At the same time, the Court allows states to serve as laboratories in protecting the health and welfare of their citizens and preserves the political accountability of local officials in the exercise of this responsibility. Broad application of implied preemption by the judiciary undermines federalism.

Narrowly circumscribing preemption in this case is also necessary to avoid depriving wrongfully injured persons of any legal remedy. The right of access to the courts for legal redress is a fundamental right, grounded in the Constitution and in the foundations of the common law. This Court has suggested that legislation which deprives wrongfully injured persons of all means of remedy violates due process. At the least, this Court should not impute to Congress the unexpressed intention to shut the courthouse doors to the very persons ERISA was intended to protect.

2. The court of appeals below correctly restricted the scope of preemption state causes of action that duplicate the duties established in ERISA itself. The structure of the statute, which imposes duties that are administrative and procedural in nature, indicates that Congress did not intend to eliminate state law duties concerning the quality of medical treatment decisions.

This Court has laid out a clear path for determining whether a plaintiff's cause of action is preempted by federal requirements. That analysis looks to the duties that are the predicate for plaintiff's cause of action. In this case, the duty of care imposed by the Texas act does not duplicate or conflict with the administrative and procedural duties imposed by ERISA. Indeed, as this Court has indicated, Congress appears to have assumed that state professional liability standards would continue to serve as a check on the financial interests of providers. ERISA's savings clause, preserving state laws that, like the Texas statute, regulate insurance, strongly indicates the intent of Congress to save such state regulation from preemption.

3. Petitioners' alarmist warnings that upholding the Texas statute will result in substantial increases in the cost of benefit plans are contrary to the experience in Texas and elsewhere. Liability of managed care entities has resulted in neither a flood of litigation nor significant increases in premiums. More fundamentally, balancing the costs of liability against the reduction of wrongful injury is one that is most appropriate for the legislature. The Texas legislature has done precisely that, and this Court should not set aside the result.

ARGUMENT

I. THE SCOPE OF STATE LAW PREEMPTED BY ERISA'S CIVIL ENFORCEMENT PROVISIONS MUST BE NARROWLY DRAWN.

A. Preemption of State Causes of Action, Beyond Those Which Duplicate the Federal Causes of Action Provided by ERISA, Intrudes Upon Traditional State Responsibility for Protecting Health and Safety.

Every preemption case is about federalism. The Supremacy Clause grants Congress the power to set aside the laws of the States. U.S. Const., art. VI, cl. 2. In determining whether Congress has exercised this substantial power, the intent of Congress provides the "ultimate touchstone." *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 45 (1987) (quoting prior cases), and the judiciary's "sole task is to ascertain the intent of Congress." *California Federal Savings and Loan Ass'n v. Guerra,* 479 U.S. 272, 281 (1987).

In many cases and in many circumstances, especially in matters involving the health and safety of Americans, this Court has approached this task with a "strong presumption against preemption." *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 523 (1992). The Court has stated it will find preemption only where Congress has made its intent to override state law "clear and manifest." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), quoted in *Cipollone*, *supra*, at 516; and in *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

Requiring that Congress make clear its intent to override state law "provides assurance that the

federal-state balance . . . will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). The Court thereby promotes a healthy federalism by "avoiding unintended encroachments on the authority of the States." *CSX Transp. Inc. v. Easterwood,* 507 U.S. 558, 664 (1993).

This presumption against preemption applies not only to the question of whether Congress intended to preempt state law, but it also requires that courts narrowly define the scope of preemption. *Medtronic, Inc. v. Lohr, supra,* at 485; *Cipollone, supra,* at 518. *See also CSX Transp. Inc. v. Easterwood, supra*, at 658-59 (narrowly construing the scope of express preemption under the Federal Railroad Safety Act "in light of the presumption against preemption").

This principle is fully applicable to questions regarding the scope of preemption of state law by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq*. Addressing ERISA's express preemption provision, § 514(a), 29 U.S.C. § 1144(a), the Court stated:

> [I]n cases like this one, where federal law is said to bar state action in fields of traditional state regulation, we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

New York State Conference of Blue Cross & Blue Shield Plans, Inc. v. Travelers Ins. Co., 514 U.S. 645, 655 (1995) (citations omitted).

Narrowly construing the scope of federal preemption is necessary to preserve "the

constitutional role of the States as sovereign entities." *Alden v. Maine*, 527 U. S. 706, 713 (1999). The Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), determined that the States do not enjoy substantive protection under the Tenth Amendment. Rather, their sovereign interests "are more properly protected by the procedural safeguards inherent in the structure of the federal system," by virtue of the States' representation in Congress. *Id.* at 552.

The corollary to this proposition is that the States must be assured meaningful opportunity to protect their interests by requiring that Congress make clear the extent to which federal legislation is to override state law. As Justice O'Connor has explained:

> By declining to infer preemption in the face of congressional ambiguity, the Court is . . . furthering the spirit of *Garcia* by requiring that decisions restricting state sovereignty be made in a deliberate manner by Congress, through the explicit exercise of its lawmaking power to that end.
>
> * * *
>
> Application of the plain statement rule thus may avoid a potential constitutional problem. Indeed, inasmuch as this Court in Garcia has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise.

Gregory v. Ashcroft, 501 U.S. 452, 464 (1991). *See also Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 907 (2000) (Stevens, J., dissenting).

Petitioners in this case ask the Court to broadly extend the scope of "complete" preemption under § 502(a) of ERISA, 29 U.S.C. § 1132(a). Significantly, the Court's decision that a claim for benefits that falls within § 502(a) is completely preempted, not only invalidating the state law claim but transforming it into one that arises under federal law, is not based on the text of the statute. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64-66 (1987).

ATLA submits that the range of state laws subject to this "extraordinary preemptive power," *id.* at 65, be narrowly circumscribed.

The "regulation of health and safety matters is primarily and historically, a matter of local concern." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985). The licensing, regulation, and tort liability of physicians, hospitals and other health care providers is the responsibility of the states. Regulation of the business of insurance is the exclusive province of the states. McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

Yet Petitioners would deprive state lawmakers of the authority to protect their citizens in the changing medical care system, locking them into a regime of non-accountability for medical care organizations despite the lack of any clear evidence of congressional intent to do so. Such unduly broad preemption forecloses one of the "happy incidents of our federal system," that a state may serve as a "laboratory" in protecting the health and wellbeing of its citizens as health care delivery changes. *New State Ice Co. v. Liebman*, 285 U.S. 262, 280 (1931) (Brandeis, J., dissenting).

Equally important, the proper federal-state balance preserves the political accountability of officials responsible for taking such actions. "Federalism serves to assign political responsibility, not to obscure it." *United States v. Lopez*, 514 U.S. 549, 577 (1995), quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). Narrowly construing the unexpressed intent of Congress to override state law preserves the objective that "state governments remain responsive to the local electorate's preferences [and] state officials remain accountable to the people." *New York v. United States*, 505 U.S. 144, 168 (1992).

Focusing on the institutional responsibility of the judicial branch, Judge Kenneth Starr has pointed out the dangers of the course urged by Petitioners:

> When courts preempt state laws without explicit congressional guidance, unelected and unaccountable officials substitute their preferences for those of the citizens of local communities. Unguided preemption thus erodes our national commitment to the process of self-governance . . . When judges preempt state laws in the absence of explicit congressional guidance, they in effect assume a legislative role without accepting legislative responsibility. [In addition] the overarching guarantee of "Our Federalism" is defeated.

Kenneth Starr, et al., THE LAW OF PREEMPTION: A REPORT OF THE APPELLATE JUDGES CONFERENCE OF THE AMERICAN BAR ASSOCIATION 48-49 (1991).[2]

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[2] *See also Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 907 (2000) (Stevens, J., dissenting) ("the presumption

B. This Court Should Narrowly Define the Preemptive Scope of ERISA's Civil Enforcement Provisions To Avoid Depriving Wrongfully Injured Persons of All Legal Remedies.

1. The Right of Access To the Courts To Seek Legal Redress For Injury Is a Fundamental Right.

From our nation's earliest days, this Court has recognized the duty of government to provide legal recourse for injury. Chief Justice Marshall stated:

> [T]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). As Justice O'Connor has observed, "[T]he federal interest in ensuring that all citizens have access to the courts is obviously a weighty one." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 887 (1986) (citations omitted). More recently, this Court confirmed that this right is fundamental and grounded in the Constitution. *Christopher v. Harbury*, 536 US. 403, 414 n.12 (2002).

The ancient right of access to the courts to seek legal remedy for wrongful injury predates the

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serves as a limiting principle that prevents federal judges from running amok with our potentially boundless (and perhaps inadequately considered) doctrine of implied conflict pre-emption based on frustration of purposes").

Constitution itself. Lord Coke traced it to the Magna Carta,[3] and Blackstone declared it to be an "invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress."[4] This Court has pronounced it "the duty of every State to provide, in the administration of justice, for the redress of private wrongs" under the Due Process Clause of the Fourteenth Amendment. *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885).

The right to a remedy is expressly guaranteed in the state constitution of Texas,[5] and in 38 other state constitutions. David Schuman, *The Right to a Remedy*, 65 Temple L. Rev. 1197, 1199-1201 (1992).

The common law cause of action for injuries and deaths caused by medical malpractice is well settled in every state. Andrew A. Sandor, *The History of Professional Liability Suits in the United States*, 163 J.A.M.A. 459 (1957) (citing the first malpractice decision in each state). Following

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3 Every Subject may take his remedy by the course of the Law, and have justice, and right for the injury done to him, freely without sale, fully without denial, and speedily without delay.

Edward Coke, SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 55-56 (4th ed. 1671).

4 3 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *23 & *109 (1765).

5 All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

Vernon's Ann. Texas Const. Art. I, sec.13.

hearings and testimony concerning harms cause by negligent medical decisions by managed care organizations, the citizens of Texas, through their elected representatives, extended the malpractice cause of action to "health insurance carrier, health maintenance organization, or other managed care entity for a health care plan." Tex. Civ. Prac. & Rem. Code Ann. § 80.002(a). *See* Comment,. Scott Thornton, *The Texas Health Care Liability Act: Managed Care Organizations Can Say Goodbye To Their Extensive Immunity From Lawsuits – Or At Least That Was How It Was Supposed To Work,* 30 Tex. Tech L. Rev. 1227, 1233-35 (1999). The legislation was enacted with overwhelming bipartisan support. *Id.* Essentially, the Texas Act does not require insurers or HMOs to provide any particular benefit. However, if they insist on making medical judgments, they must exercise care in doing so and may be held accountable for the harm they cause by breaching that duty. *See* Note, Shannon Turner, *ERISA Preemption of Direct Liability claims: Texas Throws Down the Gauntlet,* 78 Tex. L. Rev. 211, 214 (1999).[6]

It is undisputed that ERISA imposes no duty with respect to the quality of medical treatment decisions, nor does it provide any cause of action for compensatory damages arising from the failure to exercise due care. The broad preemption sought by Petitioners would close the doors of the courthouse to

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[6] Legislative action was necessary to overturn *Williams v. Good Health Plus, Inc.-HealthAmerica Corp.*, 743 S.W.2d 373, 378 (Tex. Ct. App. 1987) (holding that, because corporations cannot practice medicine, HMOs cannot be liable for medical malpractice). *See* Turner, *supra*, at 213-14.

victims of such failure to use due care, leaving them without any legal remedy.

This Court has indicated that complete elimination of state tort actions for compensation of injury may violate substantive due process unless the legislature has provided a reasonable alternative remedy. For example, this Court has upheld the elimination of tort actions by workers for job-related injuries where the legislature has provided "a reasonably just substitute" in the form of workers' compensation. *New York Central R. Co. v. White*, 243 U.S. 188, 198 (1917). Similarly, the Court held that the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901 et. seq. did not violate due process where Congress provided a federal statutory benefit scheme in place of maritime tort causes of action for injury. *Crowell v. Benson*, 285 U.S. 22, 40-44 (1932) (citing authorities addressing both state and federal legislation). *See also United Construction Workers v. Laburnum Const. Co.*, 347 U.S. 656, 665 (1954).

This Court in *Duke Power Co. v. Carolina Environmental Study Group,* 438 U.S. 59 (1978), suggested that the complete abolition in the Price-Anderson Act of common-law tort suits for damages in nuclear power accidents might violate substantive due process except for the "panoply of remedies and guarantees" provided by Congress. *Id.* at 86-88 and 91-93. As Justice Marshall later remarked, "our cases demonstrate that there are limits on governmental authority to abolish 'core' common-law rights, . . . at least without a compelling showing of necessity or a provision for a reasonable alternative

remedy." *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring).[7]

This Court need not delimit here the outer boundaries of Congress' authority in this regard.

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[7] In *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000), *Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344 (2000) and in *Cipollone, supra*, this Court held that federal regulations preempted certain state tort causes of action. Those cases, however, are distinguished by the direct conflict between the state law and federal regulation.

In *Shanklin* and *Cipollone*, this Court viewed state tort actions as equivalent to state regulation that was inconsistent with and preempted by express preemption provisions enacted by Congress. *See Cipollone* at 521, quoting *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 247 (1959)(state "regulation can be as effectively asserted through an award of damages as through" administrative regulation). In this case there is no such conflict because the Texas law is limited to treatment decisions and ERISA § 202 does not address the quality of treatment decisions.

Significantly, the *Garmon* Court carefully conditioned its ouster of state law on the understanding that access to justice would be assured through alternative federal remedies. The majority opinion emphasized the fact that the NLRA established a set of procedures and remedies in place of the state law remedies displaced by the Act. 359 U.S. at 243. Justice Harlan, in his concurring opinion, cautioned that, where Congress has not provided a remedy for tortious conduct, "there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated." *Id.* at 252 (Harlan, J., concurring).

Geier, by contrast, involved implied "conflict" preemption of state law. This Court carefully distinguished such preemption from congressional "intent to displace *all* state law in a particular area." *Id.* at 884. ATLA suggests that the latter variety of preemption, which the Court referred to as "so-called field pre-emption," is the type which § 502 of ERISA presents to this Court.

Congress has given no clear and manifest indication in ERISA of any intent to eliminate state causes of action for harm caused by negligent treatment decisions, and Petitioners point to none. In ascertaining the extent of Congress' intent to supersede state law, this Court has repeatedly stated that it will not read into congressional silence an intent to leave injured persons without any remedy at all.

For example, *Pacific Gas & Elec. Co. v. Energy Resources Comm'n.*, 461 U.S. 190, 212 (1983), held that Congress intended to occupy the field of safety regulation of nuclear power facilities. Nevertheless, this Court held the following year that the preempted field did not extend to state tort actions for injury caused by negligent administration of safety regulations. In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), the Court pointedly noted "Congress' failure to provide any federal remedy for persons injured by such conduct." Justice White, writing for the majority, concluded that Congress could not have intended to preempt state tort causes of action. "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." 464 U.S at 251. Justice Blackmun, in his dissent, agreed with the majority on this point. "The absence of federal regulation governing the compensation of victims is strong evidence that Congress intended the matter to be left to the States." 464 U.S. at 264 n.7. (Blackmun, J., dissenting).

The Court subsequently held that, even if liability under state workers' compensation statutes or state tort remedies might exert an indirect influence over how nuclear plants carry out federal

safety regulations, Congress did not intend to preempt such state causes of action and leave injured persons without remedy. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988), and *English v. General Electric Co.*, 496 U.S. 72, 85 (1990). *Compare, International Paper Co. v. Ouellette,* 479 U.S. 481, 497 (1987) (finding implied preemption of state nuisance law by the federal Clean Water Act, where the result "does not leave respondents without a remedy.").

The Court took much the same position in *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Rejecting the company's assertion that the scope of Congress' express preemption of state standards in the federal Medical Device Amendments extended to state causes of action for personal injury, Justice Stevens wrote for the plurality:

> Medtronic's argument is not only unpersuasive, it is implausible. Under Medtronic's view of the statute, Congress effectively precluded state courts from affording state consumers any protection from injuries resulting from a defective medical device. Moreover, because there is no explicit private cause of action against manufacturers contained in the MDA, and no suggestion that the Act created an implied private right of action, Congress would have barred most, if not all, relief for persons injured by defective medical devices. Medtronic's construction of § 360k would therefore have the perverse effect of granting complete immunity from design defect liability to an entire industry that, in the judgment of Congress, needed more stringent regulation.

518 U.S. at 487 (plurality opinion).

ATLA submits that these same principles should lead this Court to reject Petitioners' argument that Congress impliedly intended the scope of preemption under § 502(a) of ERISA to include state law causes of action like that provided under the Texas statute. Petitioners would have this Court slam shut the courthouse doors that the people of Texas, through their elected legislators, have held open.

Such a result would be an especially unlikely and perverse outcome of Congress' work in ERISA. The statute's stated purpose was to protect the rights of American workers and their families, a valued constituency of all legislators. This Court should hesitate to impute to Congress the intent to enact a law that is not only unjust, but senselessly so.

II. ERISA'S CIVIL ENFORCEMENT RULES PREEMPT ONLY THOSE STATE LAW CAUSES OF ACTION WHICH DUPLICATE THE ENFORCEMENT OF ADMINISTRATIVE AND PROCEDURAL DUTIES CREATED BY ERISA.

A. ERISA's Civil Enforcement Provisions Reflect Congressional Intent To Federalize Only Those Administrative Duties Created By ERISA.

Congress' intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Cipollone* at 516, quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). In cases involving ERISA preemption, the Court has looked to "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *New York State*

Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645, 656 (1995).

Congress enacted ERISA in 1974 "to promote the interest of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). *See* 29 U.S.C. § 1001(a) (1994). Congress did not mandate any particular set of benefits, nor did it regulate the quality of treatment decisions. "ERISA thus contains almost no federal regulation of the terms of benefit plans." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985). Rather, ERISA "controls the administration of benefit plans." *Travelers*, *supra,* at 651.

ERISA establishes uniform duties for plan administrators and individual rights for plan participants regarding the way the plan is administered, notice and appeal procedures. *See* Rand E. Rosenblatt et al., LAW AND THE AMERICAN HEALTHCARE SYSTEM 197 (1997 & Supp.) (discussing mandated benefits under ERISA).

In § 502 Congress established the means to enforce the rights and duties prescribed in the statute. It was clear to this Court that these duties are administrative and procedural in nature.

> Under the civil enforcement provisions of § 502(a), a plan participant or beneficiary may sue to recover benefits due under the plan, to enforce the participant's rights under the plan, or to clarify rights to future benefits. Relief may take the form of accrued benefits due, a declaratory judgment on entitlement to benefits, or an injunction against a plan administrator's improper refusal to pay benefits.

Pilot Life, supra, at 53. "In sum," the Court stated, "the detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme" to address "the need for prompt and fair claims settlement procedures." *Id.* at 54. In addition, Congress "makes clear its intention that all suits brought by beneficiaries or participants *asserting improper processing of claims* under ERISA-regulated plans be treated as federal questions governed by § 502(a)." *Id.* at 56 (emphasis added).

In *Pegram v. Herdrich*, 530 U.S. 211, 237 (2000), this Court held that the civil enforcement provisions in § 502 were intended to enforce federal duties on plan administrators regarding "pure eligibility" decisions, which the Court defined as decisions which "turn on the plan's coverage of a particular condition or medical procedure for its treatment." *Id.* at 228. The statute imposes no duties with respect to treatment decisions "about how to go about diagnosing and treating a patient's condition." *Id.* Nor does the statute impose any duties with respect to "mixed eligibility decisions," including a determination of medical necessity. *Id.* at 229-30. Indeed, the Court observed, "it is at least questionable whether Congress would have had mixed eligibility decisions in mind" when it provided for enforcement of the fiduciary duties of those administering a plan. *Id.* at 232.

The structure of the statute, which imposes only administrative duties focusing on pure eligibility decisions, and the statute's purpose of providing enforcement of uniform prompt and fair claims procedures, suggest that Congress intended complete preemption only of a state cause of action that has "duplicated the elements of a claim

available under ERISA." *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002).

The court of appeals, ATLA submits, correctly defined the scope of preemption under § 502 of ERISA.

B. The Scope of Preemption of State Causes of Action Under Section 502 Is Defined By the Duties Imposed By ERISA.

1. Petitioners' Description of the Scope of Preemption Under § 502 Is Overly Broad and Unworkable.

Petitioners reject the reasoning of the court below, which limited the scope of preemption under § 502 to state causes of action that duplicate the elements of a claim under ERISA. They urge this Court to extend the scope of preemption far beyond those elements to include claims involving treatment decisions that Congress did not provide for. However, Petitioners offer no clear, workable boundaries to determine what is preempted, and they depart from the path that this Court has clearly marked.

Aetna suggests that the scope of preemption be based on the type of damages plaintiff seeks. Aetna argues, "any state-law remedy that offers plan participants a form of relief not available under ERISA is completely preempted." Brief of Aetna Health Inc. at 12. In Aetna's view, "Section 502(a)(1)(B) does not permit the award of legal relief — such as consequential and punitive damages other than withheld benefits." *Id.* at 20.

ATLA submits that Aetna confuses "remedies" with damages. Suppose an HMO administered an ERISA plan in a racially discriminatory manner, or in a manner that violated state patient privacy laws.

Aetna's position suggests that the HMO should be immune from such claims if they seek compensatory or punitive damages. If an HMO is not to be completely immune from damage claims for even egregious misconduct, Aetna offers no boundary to divide permissible claims for legal damages from preempted claims.

Later in its brief, Aetna appears to refine its argument, stating that "an action is within the scope of ERISA's remedial provision — and is therefore completely preempted – if it challenges conduct that could have been challenged in an ERISA action, but . . . purports to authorize actions for relief not permitted by ERISA or based on conduct not actionable under ERISA. *Id.* At 26.

ATLA suggests that this self-negating definition of preempted causes of action – those based on conduct which could be challenged in an ERISA action, but not actionable under ERISA – is less than helpful.

Cigna adopts a somewhat different approach, asserting that the scope of preemption extends to state law causes of action seeking damages for wrongful denial of benefits. "The sole monetary remedy a court may provide in such an action is the benefit itself; [the civil enforcement provisions] thus preempt any state-law claims that purport to provide different or additional remedies for allegedly erroneous benefit denials" Brief of Cigna HealthCare of Texas at 5. Hence, Cigna reasons, "a state-law contract or tort claim asserting that a benefit under an ERISA-governed plan was improperly denied, and seeking remedies different from or in addition to the exclusive set of remedies set forth in ERISA § 502(a), is preempted." *Id.* at 17.

The Solicitor General echoes this view that the scope of preemption is defined by the plan's conduct in denying benefits. "Respondents' state-law claims are completely preempted . . . because petitioners' liability is dependent on a showing that respondents were entitled to have petitioners pay for benefits under the plans." Brief of the Unites States as Amicus Curiae at 7.

The error inherent in the views of Cigna and the Solicitor General is that Congress does not preempt conduct; it preempts state law – in this case a state-law cause of action. The gist of Petitioners' cause of action is failure to exercise ordinary care in making treatment decisions. Whether the patient was entitled under the plan to the medicine or procedure involved may be a circumstance, but it is not an element of the state law claim.

Plaintiff Davila, for example, suffered injury caused not by denial of Vioxx, but by the administration of naprosyn, despite its known higher rate of gastric toxicity, resulting in severe gastric ulcers. *Roark v. Humana, Inc.*, 307 F.3d 298, 303 (5th Cir. 2002). Walter Thorn, whose case was also decided by the court below, asserted a cause of action based on his plan's arbitrary delay in performing a surgery that had already been approved. *Id.* at 302.

ATLA submits that the reasoning of the court of appeals adheres most faithfully to this Court's preemption precedents.

> *2. The Scope of Preemption Under § 502 Is Determined by Examining the Legal Duty Which Forms the Basis For A Plaintiff's Cause of Action.*

Petitioners' arguments stray far from the well-marked path this Court has laid out for determining whether a state cause of action is preempted by congressionally mandated requirements:

> [W]e must fairly but – in light of the strong presumption against pre-emption – narrowly construe the precise language of [the express preemption] and we must look to each of petitioner's common-law claims to determine whether it is in fact pre-empted. The central inquiry in each case is straightforward: *we ask whether the legal duty that is the predicate of the common-law damages action* constitutes [a preempted "requirement or prohibition"].

Cipollone, at 523-24. (emphasis added). *Compare Medtronic*, *supra*, at 492-502, in which the Court examined the predicate legal duty of each of plaintiff's state causes of action to determine whether it fell within the preempted zone.

The Texas Health Care Liability Act provides:

> A health insurance carrier, health maintenance organization, or other managed care entity for a health care plan has the duty to exercise ordinary care when making health care treatment decisions and is liable for damages for harm to an insured or enrollee proximately caused by its failure to exercise such ordinary care.

Tex. Civ. Prac. & Rem. Code § 88.002(a). A "health care treatment decision" is "a decision which affects the quality of the diagnosis, care, or treatment provided to the plan's insureds or enrollees." Tex. Civ. Prac. & Rem. Code § 88.001(5). The statute specifically provides that there is "no obligation on the part of the health insurance carrier, health

maintenance organization, or other managed care entity to provide to an insured or enrollee treatment which is not covered by the health care plan of the entity." Tex. Civ. Prac. & Rem. Code § 88.002(d).

By its terms, the statute imposes no duty with respect to the administration of plans, which is the subject of ERISA. Pure eligibility decisions, for example, are not actionable under the statute. Rather, the "legal duty that is the predicate" of a cause of action under the THCLA is the duty to exercise ordinary care with respect to treatment decisions, a duty that ERISA does not encompass.

C. Congress Intended To Preserve Medical Malpractice Liability Under State Law.

Federal law has a "generally interstitial character, in the sense that Congress generally enacts legislation against the background of existing state law." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 895-96 (Rehnquist, J., dissenting) (citations omitted).

The is particularly true with respect to ERISA. The Court found that "nothing in the language of [ERISA] or the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern." *Travelers*, *supra*, at 661.

Indeed, this Court determined that the state medical malpractice standard, "the professional obligation to provide covered services with a reasonable degree of skill and judgment in the patient's interest," would serve as a "check" on HMO doctors so that treatment decisions are not made

solely on the basis of financial interest. *Pegram*, *supra*, at 219.

The HMO itself, of course, has the same financial interest in providing less or cheaper care. As this Court also observed, "many doctors and other observers argue that HMOs often ignore the individual needs of a patient in order to improve the HMOs' bottom lines." *Id.* at 220. The Texas legislators made use of the same "check" to counter this financial pressure by requiring that HMOs and managed care entities use ordinary care when making treatment decisions.

Significantly, the Court in *Pegram* indicates that Congress envisioned statutes like the THCLA to operate as part of the "general background" of state law. The Court stated that allowing a federal suit against an HMO under § 502 for the medical necessity decision of a physician-owner would be "mere replication of state malpractice actions with HMO defendants." *Id.* at 236. The only jurisdictions in which such a federal cause of action would be beneficial, the court stated, were those "States that do not allow malpractice actions against HMOs." *Id.* at 235.

The Court raised the idea that such potential duplication "would seem to be a prescription for preemption of state malpractice law." *Id.* Just a quickly, however, the Court stated that the presumption against preemption "throws some cold water on the preemption theory." *Id.* at 237. In the absence of any indication that Congress intended to federalize the law of medical malpractice, the Court concluded that plaintiffs should look to state law, including "state malpractice actions with HMO defendants" for relief.

D. ERISA's Express Preemption and Savings Clauses Indicate the Intent of Congress to Preserve State Laws Regulating the Quality of Treatment Decisions by Insurers, HMOs, and Managed Care Entities.

Further evidence of Congress' intent to leave intact state laws like THCLA, which impose a duty of care on HMOs and managed care entities when they make health treatment decisions, is found in ERISA's express preemption provision.

Congress expressly preempted all state laws that "relate to any employee benefit plan." Sec. 514(a), as set forth in 29 U.S.C. § 1144(a). However, Congress added a savings clause, stating that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance." Sec. 514(b)(2)(A), as set forth in 29 U.S.C. § 1144(b)(2)(A).

The Texas statute is clearly one that regulates insurance. THCLA's duty of "ordinary care" applies to a "health insurance carrier, health maintenance organization, or other managed care entity for a health care plan." Tex. Civ. Prac. & Rem. Code § 88.002(a).

In *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002), for example, this Court considered an Illinois statute allowing insureds under health insurance plans to have denials of certain health benefits reviewed by an independent medical reviewer. This Court found that the Illinois Act "related to" ERISA under §514(a). *Id.* at 365. However, the statute "regulated insurance" under

§514(b)(2)(A), and was therefore saved from preemption. *Id.* at 375.

THCLA, like the Illinois statute, imposes an external standard on "medical necessity" decisions by health care plans. Illinois implemented its standard through an independent medical review; Texas requires health insurance carriers, HMOs, and other managed care entities to meet a standard of "ordinary care." Like the Illinois enactment in *Rush Prudential*, the THCLA is saved from preemption by the savings clause.

At the least, Congress' explicit delineation of the scope of preemption within the statutory text "necessarily contains the best evidence of Congress' pre-emptive intent." *Easterwood*, *supra*, 507 U. S. at 664. As this Court has explained:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," *Malone v. White Motor Corp.*, 435 U.S., at 505, 98 S.Ct., at 1190, "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. California Federal Savings & Loan Assn. v. Guerra, 479 U.S. 272, 282, 107 S.Ct. 683, 690, 93 L.Ed.2d 613 (1987) (opinion of Marshall, J.). *Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.*

Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992) (emphasis added).

III. HOLDING HMOS ACCOUNTABLE FOR THE HARMS THEY CAUSE BY FAILING TO EXERCISE DUE CARE WILL NOT RESULT IN INORDINATE LITIGATION OR HIGHER INSURANCE COSTS.

Petitioners issue dire warnings to this Court against allowing states to hold HMOs accountable for the harm they cause. They claim that the result "will vastly increase the costs of providing benefits," Brief of Cigna Healthcare at 48, and that "affirmance of the decision below would deal a severe blow to the American economy." Brief of Aetna Health Inc. at 44.

Neither petitioner offers any evidence to support these alarmist predictions. Indeed, the amicus brief filed by the AAHP-HIAA states that "there is no reason to think that there is a widespread problem of plan participants wrongly denied coverage for necessary care, and then subjected to bad medical outcomes." Brief of AAHP-HIAA et al. at 22.

That assessment is confirmed by a study of over 1 million public employees, who are not barred by ERISA preemption from bringing such lawsuits. The study estimated that liability added only 3 to 13 cents per month to a member's cost for coverage. Kaiser Family Foundation, "Impact of Potential Changes to ERISA: Litigation and Appeals Experience of CalPERS, Other Large Public Employers, and a Large California Health Plan" (June 1998) available at www.kff.org/statepolicy/1415-erisa.cfm.

A study of Texas and five other states that permit lawsuits against managed care entities found that litigation and the impact on insurance

premiums have been minimal. Mark A. Hall and Gail Agrawal, "The Impact of State Managed Care Liability Statutes," 22 Health Affairs 138 (2003). *See also* Geri Aston, "Texas Trial: HMO Liability Law," American Medical News (May 28, 2001) (reporting 15 to 25 lawsuits had been filed under the THCLA since its enactment and that HMO premiums in Texas remained below the national average).

Against any costs, of course, must be weighed the value of injuries and deaths averted by imposing a financial incentive for HMOs and other managed care entities to use due care when making treatment decision.

More fundamentally, as Justice Souter observed, the "judgment about the appropriate level of expenditure for health care in light of the associated malpractice risk" is properly left to the legislature. *Pegram v. Herdrich*, 530 U.S. 211, 221 (2000).

Writing for a unanimous Court, Justice Souter continued:

> [S]uch complicated factfinding and such a debatable social judgment are not wisely required of courts unless for some reason resort cannot be had to the legislative process, with its preferable forum for comprehensive investigations and judgments of social value, such as optimum treatment levels and health-care expenditure.

Id. The Texas legislature employed just such a process in crafting the THCLA, and its members are accountable to the people of Texas. This Court should not cast aside the result of their work.

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

Daniel M. Soloway
901 Scenic Highway
Pensacola, FL 32503
(850) 435-0555

Jeffrey Robert White
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500
ATLA Senior Amicus Counsel

Attorneys for Amicus Curiae

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